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**U.S. Citizenship
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Services**

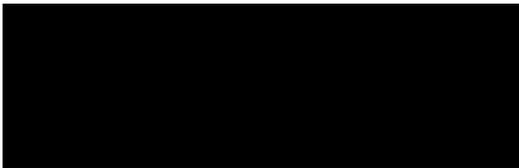


FILE: WAC 02 069 57005 Office: CALIFORNIA SERVICE CENTER Date: FEB 06 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

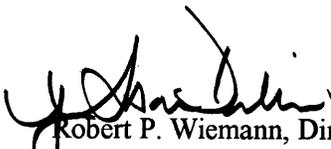
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a freight forwarder/customs broker that seeks to employ the beneficiary as a business development manager. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a business development manager. Evidence of the beneficiary's duties includes: the Form I-129; the letter accompanying the Form I-129; and the petitioner's

response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part: negotiating, implementing, and maintaining global accounts; routing shipments; establishing relationships with partners; establishing marketing strategies; completing business development plans; performing cost/benefit analyses; improving profitability; and developing a sales program.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director noted that the duties of the proffered position resemble those of marketing managers. The director stated that the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) reports that employers generally prefer a bachelor's degree for marketing manager positions; nonetheless, the DOL conveys that this is not the normal industry-wide requirement for entry into the occupation. The director found that none of the submitted Internet postings reflected organizations involved in freight forwarding/customs brokering and no evidence indicated that the petitioner normally requires applicants to possess a bachelor's or higher degree or that the duties and level of responsibility indicated complexity or authority beyond the norm in the occupational field. Last, the director noted, in part, that general managerial positions are usually not considered professional positions requiring specific academic degrees.

On appeal, counsel contends that the proffered position qualifies as a specialty occupation. According to counsel, Mr. Douglas Braddock with the Bureau of Labor Statistics in Washington, D.C., states that a degree is normally required for managerial positions in marketing, advertising, and public relations. Counsel states that the petitioner normally requires a bachelor's degree for the proffered position and that the Immigration and Naturalization Service (the Service), now Citizenship and Immigration Services (CIS), had previously approved the position for H-1B classification. The petitioner submits a copy of the approval notice and the I-129 petition on which the approval notice is based. With respect to the degree requirement, counsel claims that if competitors require a degree, as demonstrated in the submitted Internet postings, then the petitioner should have the same requirement. Moreover, counsel states that the federal court had ruled in *Safer, Inc. v. INS, - F. Supp. . - , CA 3-87-2761-R*, that position requirements in H-1 visa cases do not have to conform to industry standards. Counsel submits copies of tax returns.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining the second criterion - the degree requirement is common to the industry in parallel positions among similar organizations - include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

Counsel claims that the petitioner satisfies the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) because the Bureau of Labor Statistics finds that a degree is normally required for managerial positions in marketing, advertising, and public relations.

Counsel's claim is not persuasive. The AAO often refers to the DOL's *Handbook* to determine the education, training, and experience normally required to enter into an occupation and advance within that occupation. As described in the *Handbook*, the proffered position resembles marketing and sales manager positions. In the denial letter, the director correctly stated that, although some employers prefer a bachelor's degree, not all employers require a bachelor's degree for marketing manager positions. For sales manager positions, the *Handbook* reports that employers share the same sentiment. With respect to the statement attributed to Mr. Douglas Braddock, it is important to note that CIS interprets the term "degree" at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Because the *Handbook* explains that employers do not require a bachelor's degree in a specific specialty for marketing and sales manager positions, the petitioner does not establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, counsel claims that if competitors require a degree, as demonstrated in the submitted Internet postings, the petitioner should have the same requirement. A review of the Internet postings reveals that the postings are from organizations that are dissimilar in nature to the petitioner's business or the duties of the posted positions are not parallel to the proffered position, or both. For example, the petitioner's organization differs in nature from Pacer Stacktrain, an intermodal transportation company; Hub Group, an intermodal marketing company that is publicly held; and DHL. Positions are not parallel to the proffered position in the following manner: the duties of DHL's business analyst II and Kellogg Company's supply chain planner differ dramatically from the beneficiary's duties; no job duties are stated for DHL's market research analyst I posting; CNF does not require a bachelor's degree in a specific specialty for its logistics center manager; the duties of CNF's logistics coordinator positions differ markedly from the beneficiary's duties; and the postings from CSC Logistics, Logistics.com, and Sharf, Woodward & Associates do not require a bachelor's degree in a specific specialty.

Another of counsel's assertions is that the federal court had ruled in *Safer, Inc. v. INS, - F. Supp. .- , CA 3-87-2761-R*, that position requirements in H-1 visa cases do not have to conform to industry standards. Counsel's assertion is vague and appears to relate to the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). As previously discussed, CIS examines a number of factors when determining the second criterion: the degree requirement is common to the industry in parallel positions among similar organizations. For example, CIS considers whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree.

The AAO now turns to 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. Counsel, submitting an approval notice and a copy of an I-129 petition, asserts

that CIS has already determined that the proffered position is a specialty occupation since CIS has approved another, similar petition in the past.

Counsel's assertion is without substance. This record of proceeding does not contain all of the supporting evidence submitted to the California Service Center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the proffered position is parallel to the previously submitted petition. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

Another of counsel's claims is that the position is a specialty occupation because the petitioner claims it requires a degree. The AAO is not persuaded by this claim. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. As already related, the responsibilities and duties of the proffered position would not require a bachelor's degree.

Counsel's claim, that the nature of the specific duties are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree, is also without merit. None of the submitted evidence substantiates counsel's claim. Moreover, the *Handbook* plainly conveys that marketing and sales manager positions do not require a bachelor's degree in a specific specialty. Thus, the nature of the specific duties is not so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's degree.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.